No. 08-1575

In the Supreme Court of the United States

JASON LANDIS LINDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's waiver of his right to take a direct appeal of his sentence, followed by the dismissal of his direct appeal by virtue of that waiver, barred him from reasserting his objection to the mandatory application of the Sentencing Guidelines under *United States* v. *Booker*, 543 U.S. 220 (2005), in postconviction proceedings under 28 U.S.C. 2255.

2. Whether the court of appeals permissibly relied on the direct appeal waiver in affirming the denial of petitioner's Section 2255 motion when the government had not relied on that waiver in the district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 552 F.3d 391. The opinions of the district court (Pet. App. 14a-17a, 18a-22a) are unreported. A prior opinion of the court of appeals in this case (Pet. App. 23a-26a) is not published in the Federal Reporter but is available at 174 Fed. Appx. 174.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2009. A petition for rehearing was denied on March 24, 2009 (Pet. App. 27a-41a). The petition for a writ of certiorari was filed on June 22, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiracy to possess with intent to distribute one kilogram of heroin, in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(A). He was sentenced to 262 months of imprisonment, to be followed by five years of supervised release. The court of appeals dismissed his appeal based on his waiver of his right to take a direct appeal, and this Court denied certiorari. Petitioner then filed a motion under 28 U.S.C. 2255, which the district court denied. The court of appeals affirmed. Pet. App. 1a-13a.

1. Petitioner and others were involved in a heroin distribution ring in and around Norfolk, Virginia. On February 9, 2004, a grand jury in the Eastern District of Virginia returned an indictment charging petitioner with one count of conspiring to distribute and possess with the intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(A). C.A. App. 10-31.

Petitioner pleaded guilty pursuant to a written plea agreement. Pet. App. 2a. In exchange for his guilty plea, the government agreed not to seek an enhanced sentence by virtue of his prior convictions. C.A. App. 52-53. The plea agreement also included a provision titled "Waiver of Appeal and Review," which provided that, "in exchange for the concessions made by the United States in this plea agreement," petitioner "knowingly waive[d] the right to appeal the conviction and any sentence within the maximum provided in the statute of conviction * * * on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatsoever." Pet. App. 2a-3a (emphasis omitted) (reprinting

provision). At the ensuing change-of-plea hearing, the district court conducted the colloquy required by Fed. R. Crim. P. 11, during which petitioner stated that he had signed the agreement, initialed the bottom of each page, read each paragraph, discussed the agreement with his counsel, and fully understood its terms. Pet. App. 3a-4a. He also specifically acknowledged that he was waiving his right to appeal any sentence within the statutory maximum. *Id.* at 3a. The court accepted petitioner's plea. *Id.* at 3a-4a.

After petitioner's guilty plea but before sentencing, this Court held that the Sixth Amendment right to a jury trial was violated by increasing a defendant's sentence under a state guidelines scheme based on a fact concerning the offense found by the judge at sentencing. *Blakely* v. *Washington*, 542 U.S. 296 (2004). In light of the doubt *Blakely* cast on the mandatory application of the federal Sentencing Guidelines, several courts of appeals, including the Fourth Circuit, instructed district courts to "continue sentencing defendants in accordance with the guidelines, as was the practice before *Blakely*," while also recommending that, "[i]n the interest of judicial economy," district courts should "also announce, at the time of sentencing, a sentence * * * treating the guidelines as advisory only." *United States* v. *Hammoud*, 378 F.3d 426, 426 (4th Cir. 2004) (en banc), vacated, 543 U.S. 1097 (2005).

Petitioner's offense of conviction subjected him to a mandatory minimum sentence of ten years of imprisonment. See 21 U.S.C. 841(b)(1)(A)(i). Based solely on the one kilogram of heroin admitted by petitioner in his guilty plea, petitioner's base offense level under the Sentencing Guidelines would have been 32, see United States Sentencing Guidelines § 2D1.1(c)(4), but at sen-

tencing, the district court accepted the Presentence Report's attribution to him of additional amounts of controlled substances, resulting in a base offense level of 34, see Pet. 6 n.2; C.A. App. 151, 247. After resolving various objections and applying adjustments for petitioner's leadership role in the offense and acceptance of responsibility, the district court calculated a total offense level of 35 and a criminal history Category of V, resulting in a guidelines range of 262 to 327 months of imprisonment. Pet. App. 5a-6a; C.A. App. 151-152. The court imposed a 262-month sentence, but, following *Hammoud*, stated that "[i]n the event [it] was not confined by the sentencing guidelines in this case, the Court would impose a sentence of 120 months." Pet. App. 6a (first pair of brackets in original) (citation omitted).

2. Despite his waiver of direct appeal, on October 14, 2004, petitioner filed a timely notice of appeal, seeking to challenge his sentence based on *Blakely*. While that appeal was pending, this Court held that because the Sentencing Reform Act of 1984 (Sentencing Reform Act), Pub. L. No. 98-473, 98 Stat. 1987, made the federal Sentencing Guidelines mandatory, a Guidelines sentence that is enhanced based on facts found by the judge violates the Sixth Amendment jury trial right. *United States* v. *Booker*, 543 U.S. 220, 230-244 (2005). To remedy the Sentencing Guidelines' constitutional defect, the Court invalidated provisions of the Sentencing Reform Act that made the Guidelines mandatory, 18 U.S.C. 3553(b), 3742(e), thereby "mak[ing] the Guidelines effectively advisory." *Booker*, 543 U.S. at 245.

On April 5, 2006, the court of appeals granted the government's motion to dismiss petitioner's appeal based on the appeal waiver in his plea agreement. Pet. App. 23a-26a. The court observed that petitioner did not

contend that the district court "failed to question" him about the waiver, or that he did not understand its significance, or that his sentence exceeded the statutory maximum, or that the government in any way breached the agreement. *Id.* at 25a. The court rejected petitioner's argument that the language of the waiver did not extend to challenges based on *Blakely* and *Booker*, and it enforced the appellate waiver by dismissing the appeal. *Id.* at 23a-26a. The court of appeals denied a petition for rehearing, C.A. App. 176-177, and this Court denied certiorari, *Linder* v. *United States*, 549 U.S. 938 (2006).

3. On July 13, 2006, petitioner filed a pro se "Memorandum in Aid of Sentencing" in the district court, asking it to vacate the 262-month sentence and impose the alternative 120-month sentence based on *Booker*. C.A. App. 183-185. In accordance with the procedures outlined in *Castro* v. *United States*, 540 U.S. 375 (2003), the district court notified petitioner that it intended to construe his submission as a motion to vacate, set aside or correct his sentence under 28 U.S.C. 2255. C.A. App. 188-192. Petitioner indicated through counsel that he did not oppose that course of action. *Id.* at 194.

The district court denied petitioner's request for imposition of the alternative sentence on the ground that *Booker* was not retroactively applicable to prisoners whose convictions "became final before *Booker* was decided." Pet. App. 21a. The court held that petitioner's conviction became final in October 2004, following the entry of judgment by the district court. Accordingly, the court concluded that *Booker* did not apply to petitioner. *Id.* at 21a-22a. Petitioner filed a motion to alter or amend the judgment, arguing that his conviction had not become final when *Booker* was announced because

he timely filed a notice of appeal from the judgment. The district court denied that motion. *Id.* at 17a.

4. The court of appeals affirmed. Pet. App. 1a-13a. As an initial matter, the court of appeals agreed with petitioner that "his conviction was not 'final' until [this Court] denied certiorari," in October 2006. *Id.* at 10a. Accordingly, the court of appeals concluded because *Booker* was decided in January 2005, the district court erred in disposing of petitioner's Section 2255 motion on the ground that he sought retroactive application of *Booker*. *Ibid.*; see also *Booker*, 543 U.S. at 268 ("[W]e must apply today's holdings—both the Sixth Amendment holding and our remedial interpretation of the Sentencing [Reform] Act—to all cases on direct review.") (citing *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987)). The court also noted that petitioner's appellate-review waiver precluded him only from bringing a direct appeal and did not include a waiver of "his right to seek collateral review under [Section] 2255." Pet. App. 3a n.1.

The court of appeals nonetheless affirmed the district court's judgment on different reasoning. Pet. App. 11a-13a. The court observed that "on direct appeal" petitioner had "challenged his sentence based on *Blakely* and *Booker*," *id.* at 11a, even though his challenge was ultimately deemed to be "within the scope of his plea agreement's knowing and voluntary direct appeal waiver." *Id.* at 11a-12a. The court concluded that petitioner "may not circumvent a proper ruling on his *Booker* challenge on direct appeal by re-raising the same challenge in a [Section] 2255 motion." *Id.* at 12a.[1]

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[1] Petitioner posited that the government waived the argument that the direct-appeal waiver served as a procedural bar to collateral relief

The court of appeals denied petitioner's petition for rehearing en banc, see Pet. App. 27a-28a, with three judges voting for rehearing en banc, one of whom filed a dissent. The dissenting judge would have found no procedural impediment to petitioner's pursuit of relief under Section 2255, because his appeal waiver was limited to a direct appeal and did not extend to a Section 2255 motion, and his case was not final when *Booker* was decided. The dissent also believed that the government had waived its right to rely on petitioner's waiver by failing to raise the argument in the district court. On the merits, Judge Motz concluded that petitioner's 262-month could not stand consistent with *Booker*. *Id.* at 28a-41a.

ARGUMENT

Petitioner asks this Court to review (1) the court of appeals' application of what he terms the doctrine of "collateral estoppel" (Pet. 13) to bar him from obtaining review of the merits of his claim, and (2) "to decide whether * * * *Day v. McDonough*, 547 U.S. 198 (2006), should apply to [Section] 2255 proceedings," Pet. 19. On the first question, the court of appeals' reasoning, properly understood, is sound and its judgment is correct. Moreover, this case does not suitably present any question of wide importance. The second question is not presented by this case, nor is there any published appellate authority on the question, let alone a split in the circuits.

1. The court of appeals reasoned that, because petitioner's challenge to the mandatory application of the Sentencing Guidelines on direct appeal was dismissed on

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by failing to raise that asserted bar before the district court. But given "the unique circumstances of this case," the court of appeals concluded it would consider the argument even if it was waived. Pet. App. 12a n.2.

the basis of his waiver of appeal, he could not "re-rais[e] the same challenge in a [Section] 2255 motion." Pet. App. 11a-12a. The court elaborated by stating that petitioner could not "circumvent a proper ruling on his *Booker* challenge on direct appeal by re-raising the same challenge in a [Section] 2255 motion." *Id.* at 12a. Petitioner interprets that holding as an application of a "collateral estoppel bar."[2] Pet. 10-12, 13-19. But the court of appeals did not use that terminology, and it does not appear that the court applied that doctrine. Rather, the court of appeals' decision is better understood as holding that petitioner's waiver of further direct review of his sentencing claim prevents him from freely raising it on collateral review. So understood, the court of appeals' reasoning and judgment are correct. In any event, this case would not be a suitable vehicle for addressing the legal issues arising from the unusual facts of this case, let alone addressing any broader questions of preclusion law that petitioner claims are presented here.

a. In *Sanders* v. *United States*, 373 U.S. 1 (1963), this Court established that a previous federal determination of a claim on collateral review is controlling in a subsequent round of collateral review if "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Id.* at 15. In

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[2] Collateral estoppel, or issue preclusion, bars relitigation of an issue of fact or law that was actually litigated and determined by a valid final judgment, where that determination was essential to that judgment. See *Bobby* v. *Bies*, 129 S. Ct. 2145, 2152 (2009); Restatement (Second) of Judgments § 27 (1982).

Davis v. *United States*, 417 U.S. 333 (1974), the Court recognized that *Sanders*' bar to relitigation on collateral review extends to claims that were determined on direct review. *Davis* further held, however, that one of *Sanders*' exceptions to the bar on relitigation of claims—specifically, an intervening change of law—applies when a claim was initially raised and resolved on direct appeal and is asserted again in an initial motion under Section 2255. *Id.* at 342. *Davis* thus establishes that in federal criminal prosecutions, law-of-the-case principles apply to claims resolved on direct appeal and then reasserted in a motion under Section 2255. See *ibid.*; see also *Reed* v. *Farley*, 512 U.S. 339, 358 (1994) (Scalia, J., concurring in part and concurring in the judgment) ("[C]laims will ordinarily not be entertained under [Section] 2255 that have already been rejected on direct review."); *Withrow* v. *Williams*, 507 U.S. 680, 721 (1993) (Scalia, J., concurring in part and dissenting in part) ("[F]ederal courts have uniformly held that, absent countervailing considerations, district courts may refuse to reach the merits of a constitutional claim previously raised and rejected on direct appeal.").

In the court of appeals, the government argued that, because petitioner "litigated his Sixth Amendment issue on direct appeal and lost," petitioner "may not revive it in a [Section] 2255 motion." Gov't C.A. Br. 10. That argument in part relied on the Section 2255 relitigation bar. See *id.* at 11 (citing, *inter alia*, *Boeckenhaupt* v. *United States*, 537 F.2d 1182, 1183 (4th Cir.), cert. denied, 429 U.S. 863 (1976), to support the proposition that "because [petitioner] did raise and lost his Sixth Amendment claim in his direct appeal, he may not relitigate that issue now").

Application of that bar, however, depends on a prior ruling on the merits. See *Davis*, 417 U.S. at 342. Petitioner did not receive a determination of his sentencing claim on the merits in his direct appeal, because that appeal was dismissed based solely on the appellate waiver. Pet. App. 25a-26a. As the dissenting judge below noted, a valid appeal waiver cannot be deemed a ruling on the merits since the very consequence of the waiver is a dismissal of the appeal "*without addressing the merits*." *Id.* at 35a-36a (quoting *United States* v. *Blick*, 408 F.3d 162, 167-168 (4th Cir. 2005)).[3]

b. In the court of appeals the government also argued that an additional consideration weighing against petitioner's claim was that a defendant "who could have raised a constitutional issue on direct appeal, but failed to raise it, would have defaulted on that claim in a [Section 2255 proceeding]," and petitioner's "conscious choice to give up his right to appeal in exchange for a plea agreement should not place him in a better position." Gov't C.A. Br. 11-12. That argument does not depend on a prohibition against relitigating claims already decided on the merits, but rather on the principle that a defendant who expressly surrenders his right to take an appeal in return for concessions by the govern-

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[3] The government did not rely on a relitigation bar based on the *district court's* action in ruling on the merits of petitioner's Sixth Amendment claim. Such a bar may apply to unappealed claims. See, *e.g.*, *Kaufman* v. *United States*, 394 U.S. 217, 227 n.8 (1969) (relief may be denied under Section 2255 "where the trial *or* appellate court has had a 'say' on a federal prisoner's claim") (emphasis added). But it would not apply here because of the unusual circumstance that petitioner's Section 2255 motion relies on a change in law since the district court's decision, see *Davis*, *supra*, yet is not barred by the non-retroactivity rule of *Teague* v. *Lane*, 489 U.S. 288, 310 (1989) (opinion of O'Connor, J.).

ment should not be better off than another defendant who simply defaults his appeal. Both situations implicate the longstanding principle that "[s]o far as convictions obtained in the federal courts are concerned, the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal." *Sunal* v. *Large*, 332 U.S. 174, 178 (1947). Petitioner's waiver of appeal therefore requires that he show at least what a defendant would need to show in order to overcome an ordinary procedural default.

In *Kaufman* v. *United States*, 394 U.S. 217 (1969), this Court expressly contemplated the denial of Section 2255 relief to a federal prisoner who forewent a direct appeal: "[T]he [Section] 2255 court may in a proper case deny relief to a federal prisoner who has deliberately bypassed the orderly federal procedures provided * * * by way of appeal—*e.g.*, * * * appeal under [Fed. R. App. P.] 4(b)." *Id.* at 227 n.8. Similarly, the Court explained in *Bousley* v. *United States*, 523 U.S. 614, 621 (1998), that "the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." There, the defendant "contested his sentence on appeal, but did not challenge the validity of his plea. In failing to do so, [he] procedurally defaulted the claim he now presses." *Ibid.* See also *Johnson* v. *United States*, 838 F.2d 201, 202 (7th Cir. 1988) (Easterbrook, J.) ("[F]orgoing an appeal bars collateral review of appealable issues."); *United States* v. *Pipitone*, 67 F.3d 34, 38 (2d Cir. 1995) (applying procedural default principles to a "party who fails to raise an issue on direct appeal and subsequently endeavors to litigate the issue via a [Section] 2255 petition").

The court of appeals recognized this line of authority by supporting its holding with a citation to a treatise's

discussion of the consequences for collateral review of waiving direct appeal in federal criminal prosecutions. Pet. App. 12a-13a (citing Brian R. Means, *Federal Habeas Practitioner Guide* Jurisdiction ¶ 1.23.0 (2006-2007) ("Where the [habeas] petitioner only waives the right to appeal, he is not precluded from filing a petition for collateral review. * * * But he is precluded from raising claims that are the sort that *could have* been raised on appeal.")). The court of appeals followed that citation with a "*cf.*" citation to several cases applying the relitigation bar, including *Boeckenhaupt*, *supra*. Pet. App. 13a. The court's references to those cases as analogous authority, rather than directly supportive authority, confirms that the court did not treat this case as controlled by a prior merits determination of petitioner's challenge to the mandatory application of the Sentencing Guidelines. To the contrary, the court of appeals correctly applied the principle that, when a defendant waives his direct appeal, a motion under Section 2255 cannot "do service for an appeal." *Sunal*, 332 U.S. at 178.

c. Petitioner contends (Pet. 18) that under the court of appeals' decision, "every defendant who waives a right to a direct appeal effectively waives all rights of review." That is incorrect. Most obviously, such a defendant has not waived claims that could not, or normally would not, be raised on direct appeal at all. See, *e.g.*, *United States* v. *Baramdyka*, 95 F.3d 840, 844 (9th Cir. 1996) (holding defendant's waiver of right to appeal did not waive his right to raise claims of ineffective assistance of counsel in a Section 2255 proceeding), cert. denied, 520 U.S. 1132 (1997); see generally *Massaro* v. *United States*, 538 U.S. 500 (2003) (ineffective assistance of counsel claims need not be raised on direct appeal).

And, as a general matter, if a direct appeal waiver were treated as a form of procedural default, then a defendant may press any cognizable claim if he can make a sufficient showing to overcome his default.

Because petitioner waived his right to an appeal, he should have to meet a higher standard than the usual cause-and-prejudice standard for excusing mere procedural default. See *Johnson*, 838 F.2d at 203 ("Our case involves a considered waiver, not a default. It should be harder to rescind a conscious choice than to recoup from an unconsidered omission."). But petitioner cannot satisfy even the ordinary standard to overcome a procedural default. A defendant can present a defaulted claim "if [he] can first demonstrate either 'cause' and actual 'prejudice,' * * * or that he is 'actually innocent.'" *Bousley*, 523 U.S. at 622 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 485, 496 (1986); *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977); and *Smith* v. *Murray*, 477 U.S. 527, 537 (1986)). Petitioner has never suggested he could establish cause for excusing his well-considered and bargained-for waiver of direct appeal, nor does he make a claim of actual innocence. Nor could petitioner demonstrate cause to excuse his waiver. Under *Carrier*, "cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [his] efforts," 477 U.S. at 488, but here the appeal waiver was a bargain petitioner himself struck.

Petitioner's failure to justify why he should be permitted to raise a claim in a Section 2255 motion that he agreed not to raise on direct appeal cannot be excused by the government's failure to rely on his appeal waiver in the district court. Petitioner had ample opportunity and incentive to argue that his waiver was not an obsta-

cle: he could have directly attacked his waiver in his Section 2255 motion on ineffective assistance of counsel or other grounds. And, once the government did raise the issue, he could have responded in his reply brief in the court of appeals. He could also have made an argument in his petition for rehearing papers (in which he even recognized the rule as "procedural default," Pet. for Reh'g 5; Pet. for Reh'g Reply 2). He did none of these. Because petitioner waived his claim about the mandatory application of the Sentencing Guidelines by foregoing an appeal, and he does not establish any reason why Section 2255 should do service for that waived appeal, the court of appeals was correct to reject petitioner's effort to present that claim on collateral review.

d. This case presents no issue of wide significance warranting this Court's review. Importantly, the issue in this case arises only because this Court's decision in *Booker* was announced while petitioner's case was on direct review, but could not be applied to his case because of his appeal waiver. When a change in law occurs, its application to the vast majority of criminal cases is controlled by the twin principles that new rules of law are applicable to criminal cases on direct review, see *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987), but are generally not retroactive on collateral review, see *Teague*, *supra*; *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1032 & n.1 (2008). This case presents one of a very few fact patterns not resolved by those principles, so a decision from this Court on these facts would have very narrow relevance.

Petitioner argues (Pet. 13-19) that the decision below conflicts in its reasoning with a variety of collateral estoppel decisions in civil cases and relitigation bar decisions in criminal cases. As discussed above, however,

the court of appeals' opinion does not rely on collateral estoppel principles. There is therefore no reason to grant review to resolve the claimed conflict.

2. Petitioner also contends that this Court should grant review to decide whether *Day* v. *McDonough*, 547 U.S. 198 (2006)—which holds that district courts may raise sua sponte a state habeas petitioner's noncompliance with the one-year statute of limitations applicable to petitions under 28 U.S.C. 2254—"should apply to [Section] 2255 proceedings." Pet. 19. That question is not presented here, nor is there a division of authority in the courts of appeals.

To the government's knowledge, there is no published federal appellate authority whatever on the application of *Day* in Section 2255 postconviction proceedings, let alone a split in the circuits. Neither of the published appellate cases petitioner cites even concerns a Section 2255 proceeding. *Wilburn* v. *Robinson*, 480 F.3d 1140 (D.C. Cir. 2007), was a civil suit brought by a disappointed applicant for a governmental position, and does not address, let alone reject, *Day*'s applicability to federal postconviction proceedings under 28 U.S.C. 2255. Petitioner's citation (Pet. 16) to *United States* v. *Plascencia*, 537 F.3d 385, 392 n.15 (5th Cir. 2008), references a dissenting opinion on a distinct issue. The dissenting judge suggested that, because the ten-day period for filing a notice of appeal under Fed. R. App. P. 4(b)(1)(A)(i) is a nonjurisdictional claims-processing rule, the government's failure in a criminal case to object to the late filing of a notice results in a forfeiture. *Plascencia*, 537 F.3d at 391-392 (Owen, J., dissenting). In an accompanying footnote, the dissenting judge speculated that "if [*Day*'s] holding were extended by analogy, then a court of appeals might *sua sponte* ques-

tion the timeliness of a notice of appeal in a federal criminal appeal." *Id.* at 392 n.15. But neither the majority nor the dissent says anything about whether *Day* applies to a Section 2255 postconviction proceeding.

Moreover, *Day*'s application to Section 2255 proceedings is irrelevant here because the proceedings below do not parallel the proceedings in *Day*. In *Day*, the magistrate judge reviewing the state prisoner's Section 2254 petition sua sponte questioned the habeas petition's timeliness, despite the State's (erroneous) concession in its answer to the habeas petition that it was timely. 547 U.S. at 201-202. Ultimately, the magistrate judge recommended dismissal of the habeas petition, and the district court adopted that recommendation. *Id.* at 202. The question presented turned on "the authority of a U.S. District Court, on its own initiative, to dismiss as untimely a state prisoner's petition for a writ of habeas corpus." *Id.* at 201.

Unlike the petitioner in *Day*, petitioner here does not complain of the district court's actions. Rather, he objects that "the *court of appeals* overlooked the [government's] waiver" of affirmative defenses. Pet. 21-22 (emphasis added). Even assuming that the government could be faulted for not arguing its affirmative defenses in the district court,[4] the court of appeals was nonetheless entitled under ordinary principles of appellate review to affirm the district court's judgment on any ground supported by the record. See, *e.g.*, *United*

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[4] It is not clear that the government should be faulted; although the government did not raise the litigation bar or rely on the appeal waiver in its response to petitioner's Section 2255 motion, that short pro se paper gave no indication that petitioner sought anything other than retroactive application of *Booker* on collateral review, see C.A. App. 185, and the government responded accordingly, see *id.* at 202-204.

States v. *New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977). Petitioner had an opportunity to be heard on the relevance of the appeal waiver and the disposition of his direct appeal, in both his reply brief in the court of appeals and his petition for rehearing. The court of appeals was sensitive to how petitioner's motion had been litigated in the district court, and its considered judgment was that its disposition of the case was appropriate "in the unique circumstances of this case." Pet. App. 12a n.2. If *Day* has any relevance at all to proceedings in the courts of appeals, see Pet. 20, it surely requires no more than this. At bottom, petitioner seeks only review of the court of appeals' factbound exercise of its discretion to address an issue implicated by its prior enforcement of petitioner's appeal waiver. That decision does not raise a legal issue that warrants this Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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